

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

HUNTINGTON DIVISION

ROBERT JEROME WARREN, SR.,

Movant,

v.

**Civil Action No. 3:12-cv-04414
(Criminal No. 3:95-cr-00147-1)**

UNITED STATES OF AMERICA,

Respondent.

PROPOSED FINDINGS AND RECOMMENDATIONS

Pending before the Court are Movant's *pro se* Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, (ECF No. 637), and his Application to Proceed Without Prepayment of Fees and Costs. (ECF No. 639). This matter is assigned to the Honorable Irene C. Berger, United States District Judge, and by Standing Order has been referred to the undersigned United States Magistrate Judge for the submission of proposed findings of fact and recommendations for disposition pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons that follow, the undersigned respectfully recommends that Movant's motion be denied as successive and unauthorized and that this action be dismissed, with prejudice, and removed from the docket of the Court.

I. Relevant Procedural Background

Movant is currently serving a life term of imprisonment at the Federal Corrections Institution (FCI) in Beckley, West Virginia as a result of his January 1996 conviction for conspiracy to distribute and possess with intent to distribute cocaine base, a Schedule II controlled substance. (ECF Nos. 232 & 331). Movant filed his first §

2255 motion on October 3, 1997. (ECF No. 419). That motion was denied on the merits by the District Court on October 17, 2001. (ECF No. 480). Thereafter, Movant unsuccessfully appealed the District Court's decision to the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit"). (ECF No. 488). The Supreme Court of the United States subsequently denied certiorari on October 21, 2002. (ECF No. 506).

Pursuant to 28 U.S.C. § 2244, Movant sought authorization to file a successive application for relief, which the Fourth Circuit denied on April 23, 2004. (ECF No. 518). The Fourth Circuit again denied authorization to file a successive application on July 22, 2004. (ECF No. 524). On December 24, 2008, and again on November 7, 2011, Movant filed a Motion for Reduction of Sentence under 18 U.S.C. § 3582(c)(2). (ECF Nos. 609, 621). The District Court denied the motions on May 15, 2009 and July 31, 2012, respectively. (ECF Nos. 617, 634).

On August 16, 2012, Movant filed the present § 2255 motion. Movant did not obtain certification from the Fourth Circuit prior to filing the motion.

II. Discussion

The law is well-settled that the District Court lacks jurisdiction to consider a second or successive motion filed under 28 U.S.C. § 2255 unless the motion has been certified in advance by a panel of the appropriate Circuit Court of Appeals and contains:

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h); *See also United States v. Winestock*, 340 F.3d 200, 205 (4th Cir. 2003). In this case, Movant previously filed a § 2255 motion, which was denied on the

merits, and two motions for authorization to file a successive § 2255 motion, which were also denied. Thus, the current § 2255 motion is Movant's fourth attempt to seek collateral review of his criminal conviction or sentence. Given Movant's failure to obtain certification from the Fourth Circuit to proceed with this successive § 2255 motion, the undersigned **FINDS** that the District Court is precluded from considering it.¹

III. Proposal and Recommendations

For the reasons set forth above, the undersigned respectfully **PROPOSES** that the District Court accept and adopt the findings proposed herein and **RECOMMENDS** that Movant's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, (ECF No. 637), be **DENIED**; that his Application to Proceed Without Prepayment of Fees and Costs (ECF No. 639) be **DENIED** as moot; and that this civil action be **DISMISSED, with prejudice**, and removed from the docket of this Court.

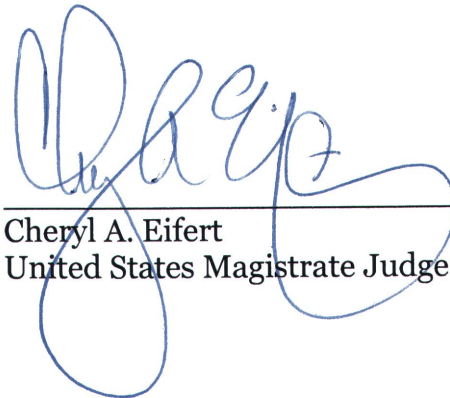
Movant is notified that this "Proposed Findings and Recommendations" is hereby **FILED**, and a copy will be submitted to the Honorable Irene C. Berger, United States District Judge. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Rules 6(d) and 72(b), Federal Rules of Civil Procedure, Movant shall have fourteen days (filing of objections) and three days (mailing) from the date of filing this "Proposed Findings and Recommendations" within which to file with the Clerk of this Court, specific written objections, identifying the portions of the "Proposed Findings and Recommendations" to which objection is made and the basis of such objection. Extension of this time period may be granted by the presiding District Judge

¹ Movant also argues that the applicable one-year statute of limitations should not act as a bar to his motion. Nevertheless, because this is a successive and unauthorized § 2255 motion, the District Court lacks jurisdiction to consider the issue of timeliness. *United States v. Plumlee*, 455 Fed. Appx. 357, n.1 (4th Cir. 2011) (citing *United States v. Winestock*, 340 F.3d 200, 205 (4th Cir. 2003)).

for good cause shown. Failure to file written objections as set forth above shall constitute a waiver of *de novo* review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. *Snyder v. Ridenour*, 889 F.2d 1363 (4th Cir. 1989); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984). Copies of such objections shall be provided to the opposing party, Judge Berger, and Magistrate Judge Eifert.

The Clerk is instructed to provide a copy of this “Proposed Findings and Recommendations” to Movant, the respondent, counsel of record, and the Honorable Irene C. Berger, United States District Judge.

FILED: September 20, 2012.



Cheryl A. Eifert
United States Magistrate Judge